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No. 92-255

In The

Supreme Court of the United States

October Term, 1992

PHILIPPINE GOODS, INC., TRANSAMERICA CORPORATION, and VICTORINO VILLACRUSIS,

Petitioners,

vs.

CONCEPCION S. WABOL and ELIAS S. WABOL,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT..... 1

ARGUMENT 2

1. The Court Should Grant Certiorari To Consider The Current Vitality Of The Doctrine Of Territorial Incorporation, And Its Applicability To The CNMI..... 2

2. The Court Should Grant Certiorari To Consider Whether The Incorporation Doctrine Authorizes The Abrogation Of The Right To Equal Protection On The Ground That Recognition Of The Right Would Be Impractical And Anomalous 9

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. United States, 182 U.S. 243 (1901) 2

Balzac v. People of Porto Rico, 258 U.S. 298 (1922) 3, 4, 5, 11, 14

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 11

Church of Jesus Christ of L.D.S. v. United States, 136 U.S. 1 (1890) 10

Commonwealth of Northern Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir.), *cert. denied*, 467 U.S. 1244 (1984) 13

DeLima v. Bidwell, 182 U.S. 1 (1901) 2

Dooley v. United States, 182 U.S. 222 (1901) 2

Dorr v. United States, 195 U.S. 138 (1904) ... 3, 4, 10, 14

Downes v. Bidwell, 182 U.S. 244 (1901) ..... *passim*

Duncan v. Louisiana, 391 U.S. 145 (1968) 14

Examining Board v. Flores de Otero, 426 U.S. 572 (1976) 3, 4, 11, 12

Feliciano v. Barcelo, 497 F. Supp. 14 (D.P.R. 1979) 11

Harris v. McRae, 448 U.S. 297 (1980) 13

Harris v. Rosario, 446 U.S. 651 (1980) 6

Hawaii v. Mankichi, 190 U.S. 197 (1903) 3, 10

Juda v. United States, 6 Cl. Ct. 441 (1984) 11

King v. Morton, 520 F.2d 1140 (D.C. Cir. 1975) 13

Morrissey v. Brewer, 408 U.S. 471 (1972) 12, 13

TABLE OF AUTHORITIES – Continued

Page

Ocampo v. United States, 234 U.S. 91 (1914) 3

Reid v. Covert, 354 U.S. 1 (1957) 5, 6, 7, 14

Torres v. Com. of Puerto Rico, 442 U.S. 465 (1979) .. 4, 6, 11

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 6, 7

Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1990) *passim*

Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) 12

Water Isle Hotel v. Kon Tiki St. Thomas, Inc., 795 F.2d 325 (3d Cir. 1986) 14

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT

Constitution of the Commonwealth of the Northern Mariana Islands, Article XII ..... *passim*

United States Constitution

Article I, Section 8 3

Fourth Amendment 6, 11

Fifth Amendment 11, 13

Fourteenth Amendment 8, 11

48 U.S.C. § 1681 8

TABLE OF AUTHORITIES – Continued

Page

Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub.L. No. 94-241, 90 Stat. 263 (1976), *reprinted in* 48 U.S.C. § 1681 note 8

Rules of the Supreme Court of the United States, Rule 37.2 1

TREATISES AND MISCELLANEOUS SOURCES

Branch, *The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards?* 9 Denver J. Int'l Law & Policy 35 (1980) 5, 7, 9

CNMI Office of Planning & Budget, *Economic Development Strategy* (1990) 16

Commonwealth Development Commission, *CNMI Overall Economic Development Strategy* (1989) 16

Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 Colum. L. Rev. 823 (1926) 4

Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations (1989)* 4, 7

Marianas Visitor Bureau Annual Report (1990) 16

INTEREST OF THE AMICUS CURIAE

Amicus Curiae Hotel Nikko Saipan, Inc. (Amicus) is a subsidiary corporation of Japan Development Corporation, a subsidiary of Japan Air Lines. Amicus owns and operates a 320-room resort hotel and a shopping mall complex on the island of Saipan in the Commonwealth of the Northern Mariana Islands (CNMI). Because Amicus is not legally permitted under Article XII of the CNMI Constitution (Article XII) to own real property in the CNMI, the hotel and mall are on leased land. Article XII also limits Amicus' leasehold interests to no more than fifty-five years. Amicus thus has a substantial economic investment over which, due to the limitations imposed by Article XII, it has only limited control and which it has no assurance of being permitted to maintain. Currently, litigation is pending against Amicus in the CNMI courts under Article XII, which seeks to divest Amicus of its right to operate its hotel.[1]

SUMMARY OF ARGUMENT

The Court of Appeals in the present case concluded that Congress validly insulated Article XII, which limits land ownership to persons of Northern Marianas descent, from constitutional scrutiny. The court relied on the doctrine of "territorial incorporation," under which only "fundamental" constitutional rights need be afforded

[1] Pursuant to Rule 37.2 of the rules of this Court, Amicus has obtained and submitted with this brief the written consent of all parties to the filing of the brief.

protection in territories which are not "incorporated" into the United States. *Wabol v. Villacrusis*, 958 F.2d 1450, 1459 (9th Cir. 1990); Pet. App. 21. The court concluded that the right to equal access to property in the CNMI was not such a right, because it would be "impractical and anomalous" to recognize that right in view of the "local culture and values" in the CNMI. 958 F.2d at 1461-62; Pet. App. 24-25.

This Court should grant certiorari to consider whether the doctrine of territorial incorporation retains its vitality today and whether it is appropriate to apply the doctrine to the CNMI. The Court also should consider whether the criterion applied by the Court of Appeals in determining whether the right to freedom from racial discrimination should be recognized in the CNMI – whether it would be "impractical and anomalous" to recognize the right – is a legally proper standard.

ARGUMENT

1. The Court Should Grant Certiorari To Consider The Current Vitality Of The Doctrine Of Territorial Incorporation, And Its Applicability To The CNMI.

The doctrine of territorial incorporation was first articulated in a series of decisions in 1901 now referred to as the "*Insular Cases*."[2] *Downes v. Bidwell*, 182 U.S. 244

[2] *See, e.g., Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *DeLima v. Bidwell*, 182 U.S. 1 (1901). Precisely which decisions the term "*Insular Cases*" comprises is not com-

(1901), is considered the most significant of the decisions. *Examining Board v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976). The Court, per Justice Brown with four Justices dissenting, held that the imposition by Congress of special duties on goods imported from Puerto Rico did not violate Article I, Section 8 of the Constitution, which requires all duties, imposts and excises to be "uniform throughout the United States." *Downes, supra*, at 287. Justice White, in a concurring opinion joined by two other Justices, reasoned that the Constitution would only apply in full force to a territory which had been "incorporated into the United States." Because the treaty of cession by which the United States acquired Puerto Rico from Spain did not provide for incorporation of the new territory into the United States, the Constitution did not apply in full force to Puerto Rico. *Id.* at 340, 342.

In subsequent decisions, the Court held that various constitutional provisions respecting criminal procedure were inapplicable to "unincorporated" territories. See, *e.g., Hawaii v. Mankichi*, 190 U.S. 197 (1903) (rights to indictment by grand jury and to jury trial inapplicable in Hawaii); *Dorr v. United States*, 195 U.S. 138 (1904) (right to jury trial inapplicable in Philippines); *Ocampo v. United States*, 234 U.S. 91 (1914) (right to indictment by grand

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pletely clear. Other cases decided at the same time as the four cited above are sometimes included, as are later decisions in the early part of the twentieth century dealing with the application of the Constitution to the "insular" territories of Puerto Rico, Hawaii and the Philippines. *See, e.g., Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); *Ocampo v. United States*, 234 U.S. 91 (1914); *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922).

jury inapplicable in Philippines); *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922) (right to jury trial inapplicable in Puerto Rico). The incorporation analysis set forth in Justice White's concurrence in *Downes* was adopted by a majority of the Court in *Dorr*, and by a unanimous Court in *Balzac*. See generally *Torres v. Com. of Puerto Rico*, 442 U.S. 465, 469 (1979); *Flores de Otero, supra*, 426 U.S. at 599 n.30.

The justification for the doctrine of incorporation, as set forth in *Downes*, "was openly racist." Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 22 (1989). Justice White in *Downes* expressed concern that immediate incorporation of an "uncivilized race" into the United States might cause "the immediate bestowal of citizenship on those absolutely unfit to receive it." 182 U.S. at 306. In *Dorr*, the Court remarked on the impossibility of establishing a right to trial by jury in "territory peopled by savages." 195 U.S. at 148. Indeed, at the time the *Insular Cases* were decided, "the dominant consideration in favor of the plenary power of Congress was the fear that, if the newly acquired territories were held to be part of the United States, people of alien race and civilization would become citizens and have the right to claim jury trials and the other safeguards of personal liberties guaranteed by the first ten Amendments to the Constitution." Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 Colum. L. Rev. 823, 827 (1926).

Thus, the justification for the doctrine of incorporation was that it was necessary to allow Congress, for a limited time, to govern newly acquired territories without all of the constraints of the Constitution. This would

permit the inhabitants to become sufficiently "civilized" for full application of the Constitution to be practical. "The rationale for the rule has been that it allows 'semi-civilized' societies to become civilized before adopting our legal system . . . . " Branch, *The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards?* 9 Denver J. Int'l Law & Policy 35, 43 (1980). In *Downes*, Justice Brown observed, "If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible. . . . " 182 U.S. at 286; *see also Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion) (the *Insular Cases* "involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions"). Similarly, there was concern that the geographical isolation of the "insular" territories would retard their assimilation into the United States. *See Balzac, supra*, at 311 (Court should not lightly infer an intention to incorporate into the United States "these distant ocean communities of a different origin and language from those of our continental people").

Finally, the incorporation doctrine's underlying premise – that Congress might find it necessary or desirable to acquire territory without affording the inhabitants full constitutional rights – reflected the imperialist model which pervaded the foreign policy of the United States and other developed nations at the turn of the century. As Justice Brown said in *Downes*, "[a] false step at this time

might be fatal to the development of what Chief Justice Marshall called the American Empire." 182 U.S. at 286.

In recent years, various members of the Court have questioned the vitality of the incorporation doctrine. In holding that spouses of American servicemen stationed abroad were entitled to jury trials, a plurality of the Court stated in 1957, "it is our judgment that neither the [Insular] cases nor their reasoning should be given any further expansion." *Reid v. Covert, supra,* 354 U.S. at 14. Concurring in a 1979 decision, four Justices, citing *Reid, supra,* said, "Whatever the validity of the [Insular] cases . . . in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment – or any other provision of the Bill of Rights – to the Commonwealth of Puerto Rico in the 1970's." *Torres v. Com. of Puerto Rico, supra,* 442 U.S. at 475-76. Justice Marshall observed in 1980 that in light of later decisions of the Court, "the present validity of those [Insular] decisions is questionable." *Harris v. Rosario,* 446 U.S. 651, 653 (1980) (Marshall, J., dissenting).

Most recently the Court, without discussing their current vitality, referred to the *Insular Cases* in holding that the Fourth Amendment did not apply to a search and seizure by United States agents of property owned by a nonresident alien and located in a foreign country. *United States v. Verdugo-Urquidez,* 494 U.S. 259, 274-75 (1990).[3]

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[3] The *Insular Cases* were not directly apposite in *Verdugo-Urquidez,* since the case did not involve the applicability of a constitutional provision to a United States territory. The Court reasoned that if, under the *Insular Cases,* not all constitutional

One Justice, concurring, noted that the cases had not been overruled, *id.* at 277 (Kennedy, J., concurring), while two more, in dissent, stated that they "were limited to their facts long ago." *Id.* at 291 (Brennan, J. and Marshall, J., dissenting, citing *Reid, supra*).

Commentators outside the Court have strenuously questioned the vitality of the incorporation doctrine in view of current conditions. One respected commentator has stated that the doctrine's values and premises "have been overruled by time" and that "the time has come to re-examine the present expansionist views of the Territorial Clause and federal power as set forth in the *Insular Cases*." Leibowitz, *supra*, at 19, 26. The same authority states that modern territorial views of the *Insular Cases* regard the decisions as a "major disaster" and that the views of the dissenting Justices, if adopted, "would have saved the nation and the territories considerable pain." *Id.* at 21 n.68, 24. Another commentator, writing with specific reference to the CNMI, states that "with modern transportation, communication, and technology, the territories cannot be considered far away and isolated as they no doubt were in 1901" and that the justifications for the incorporation doctrine "are not valid today where all the territories have television, direct communications with the States, automobiles, jet airplane transportation, and when many of the inhabitants have high school and college education, and where virtually all speak and understand English." Branch, *supra*, at 37 n.15, 66.

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provisions were applicable to unincorporated territories, it was even less arguable that they extended to aliens in foreign nations. 494 U.S. at 268.

If it is questionable whether the doctrine of incorporation remains valid at all, its applicability to the CNMI is even less justifiable. As discussed previously, the principal purpose of the doctrine was to permit the annexation of outlying territories without immediately conferring American citizenship and constitutional rights on persons who were not thought to be ready to enjoy them. Whether or not that purpose was justified with respect to territories acquired by cession at the turn of the century, it hardly applies to the CNMI. The CNMI was created with the express purpose that it would exist in "political union" with the United States. In 1976, the United States and the CNMI entered into a Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant), Pub.L. No. 94-241, 90 Stat. 263 (1976), *reprinted in* 48 U.S.C. § 1681 note. Section 101 of the Covenant provided that the CNMI would exist "in political union with and under the sovereignty of the United States of America." Section 301 provided that virtually all of the existing population, as well as anyone born in the CNMI thereafter, would be United States citizens. Section 501 provided that certain provisions of the United States Constitution, including the Fourteenth Amendment guarantees of equal protection and due process, would apply to the CNMI, but exempted from their application the land alienation restrictions embodied in Article XII.

Under these circumstances, there can be little justification under the incorporation doctrine for declining to hold the Equal Protection Clause fully applicable to the CNMI. None of the concerns underlying the incorporation doctrine pertains to the CNMI. The CNMI having

elected to enter into a political union with the United States, and its people having elected to become United States citizens, it hardly can be argued that its people are too alien, or its customs too different, to permit the application of the constitutional provisions which apply to the rest of the nation. Rather, "once a society, such as the Northern Marianas, *freely* chooses to become a 'part' of the United States, and its inhabitants *freely* choose to become citizens of the United States, then the application of the Constitution should not be the subject of negotiation. In such a situation, deviations from constitutional standards cannot be justified under the guise of a 'different cultural setting'. . . . " Branch, *supra*, at 38-39 (emphasis in original).

2. The Court Should Grant Certiorari To Consider Whether The Incorporation Doctrine Authorizes The Abrogation Of The Right To Equal Protection On The Ground That Recognition Of The Right Would Be Impractical And Anomalous.

If Congress today retains the power to apply constitutional guarantees to unincorporated territories on a selective basis, there still remains the question whether it acted properly in exempting the CNMI from the prohibition against racial discrimination. The *Insular Cases* and later decisions recognize that certain constitutional guarantees must be respected even in unincorporated territories. In *Downes, supra*, Justice Brown stated that, irrespective of the question of incorporation, Congress in legislating for the territories "would be subject to those fundamental limitations in favor of personal rights which

are formulated in the Constitution and its amendments. . . . " 182 U.S. at 268, quoting from *Church of Jesus Christ of L.D.S. v. United States*, 136 U.S. 1, 44 (1890); *accord, Dorr v. United States, supra*, 195 U.S. at 146. He also suggested, in dictum, a distinction between "natural rights" and "artificial or remedial rights." Natural rights included freedom of religion, speech and the press; personal liberty and individual property; free access to courts; "due process of law" and "equal protection of the laws"; freedom from unreasonable searches and seizures and cruel and unusual punishment; and "such other immunities as are indispensable to a free government." Artificial or remedial rights included the rights to citizenship, suffrage, and "the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence." 182 U.S. at 282-83.

Justice White in the same case said that even in unincorporated territories, Congress would be bound by those "principles which are the basis of all free government." *Id.* at 290-91; *accord, Dorr, supra*, at 147. He described these generally as "general prohibitions in the Constitution in favor of the liberty and property of the citizen," and suggested that among them would be freedom of religion and press, and the guarantee against cruel and unusual punishment. 182 U.S. at 294, 298. Shortly thereafter, the Court suggested in dictum that "most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation." *Hawaii v. Mankichi, supra*, 190 U.S. at 217-18; *accord, Dorr, supra*, at 144. Later, the Court observed that "[t]he guaranties of certain fundamental rights declared in the Constitution, as for

instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Porto Rico. . . . " *Balzac v. People of Porto Rico, supra,* 258 U.S. at 312-13.

In *Flores de Otero, supra,* the Court squarely addressed the question whether the constitutional prohibition against discrimination on the basis of alienage applied to Puerto Rico. Holding that Puerto Rico could not restrict engineering licenses to United States citizens, the Court said, "It is clear now, however, that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico." 426 U.S. at 600. In other decisions, this Court and lower courts have held numerous other constitutional protections to be applicable in "unincorporated" territories. *See, e.g., Torres v. Com. of Puerto Rico, supra,* 442 U.S. at 471 (Fourth Amendment applies to Puerto Rico, either directly or by operation of Fourteenth Amendment); *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 668-69 n.5, 680 (1974) (Due Process Clause of either Fifth or Fourteenth Amendment and, apparently, Just Compensation Clause, apply to Puerto Rico); *Juda v. United States,* 6 Cl. Ct. 441, 458 (1984) (Just Compensation Clause of Fifth Amendment applies to Marshall Islands); *Feliciano v. Barcelo,* 497 F. Supp. 14, 33 (D.P.R. 1979) (Eighth Amendment protection available to Puerto Rico residents through action under 42 U.S.C. § 1983).

Against this backdrop, the Court of Appeals in the present case nonetheless held that Article XII was exempt from equal protection scrutiny. The court stated that even

though, under *Flores de Otero*, residents of unincorporated territories are entitled to equal protection, "[i]t is the specific right of equality that must be considered for purposes of territorial incorporation, rather than the broad general guarantee of equal protection." 958 F.2d at 1460 n.19; Pet. App. 23 n.19. Once such a "specific right of equality" is identified, whether the right is "fundamental" for purposes of the incorporation doctrine, so that it must be recognized in unincorporated territories, depends on whether it would be "impractical and anomalous" to recognize it. 958 F.2d at 1461; Pet. App. 24. Concluding that it would be impractical and anomalous to require the CNMI to permit land ownership on a racially equal basis, the court held that "the right of equal access to long-term interests in Commonwealth real estate" was not "fundamental." 958 F.2d at 1460, 1462; Pet. App. 21, 27.

The Court of Appeals' analysis is a dramatic departure from precedent in at least two respects. First, there is no support in the decisions of this Court for the proposition that where the general principle of equal protection applies, there may be "specific right[s] of equality" which do not apply. The Court of Appeals compared this case to decisions involving the application of procedural due process, noting that even where the right to due process exists, a specific component of it, such as the right to a jury trial, may not. 958 F.2d at 1460 n.19; Pet. App. 23 n.19. Procedural due process, however, "is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *accord, Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985). Not all situations demand

"the full panoply of rights." *Morrissey, supra,* at 480. In contrast, "[t]he guarantee of equal protection under the Fifth Amendment *is not a source of substantive rights or liberties,* but rather *a right to be free from invidious discrimination* in statutory classifications and other governmental activity." *Harris v. McRae,* 448 U.S. 297, 322 (1980) (footnote omitted; emphasis added). While it may be appropriate in applying procedural due process to consider whether particular rights are mandated, a right to freedom from discrimination either exists or does not. *Flores de Otero* and the other authorities cited above leave no doubt that the right exists even in "unincorporated" territories.

Second, there is no support in the *Insular Cases* or subsequent decisions for the Court of Appeals' conclusion that a constitutional right need not be recognized in an unincorporated territory if it would be "impractical and anomalous" to recognize it. In so concluding, the Court of Appeals relied exclusively on cases involving the right to a jury trial. The court first cited one of its own decisions, *Commonwealth of Northern Mariana Islands v. Atalig,* 723 F.2d 682 (9th Cir.), *cert. denied,* 467 U.S. 1244 (1984), in which it had held that the right to a jury trial did not apply in the CNMI. 958 F.2d at 1460-61; Pet. App. 22-24. It then adopted the "impractical and anomalous" standard from *King v. Morton,* 520 F.2d 1140 (D.C. Cir. 1975). The court in *King,* in determining whether there was a right to a jury trial in American Samoa, stated the relevant inquiry as whether in the territory "circumstances are such that trial by jury would be impractical and anomalous." *Id.* at 1147 (citations omitted). The court

supported its statement by citing to Justice Harlan's concurring opinion in *Reid v. Covert, supra,* 354 U.S. at 75 (Harlan, J., concurring), another decision involving the right to a jury trial.

The Court of Appeals' reliance on these authorities was entirely misplaced. The *Insular Cases* recognized that the right to a jury trial was merely an "institution of Anglo-Saxon origin," *Balzac, supra,* 258 U.S. at 310, and not one of those rights which are "the basis of all free government." *Dorr v. United States, supra,* 195 U.S. at 147-48. Although this Court has held a jury trial to be fundamental to the *American* scheme of justice, it has also recognized that it is "easy to imagine" a criminal process which is fair and equitable without juries. *Duncan v. Louisiana,* 391 U.S. 145, 149-50 n.14 (1968).[4] Thus, the right to a jury trial by definition is not basic to a free government and need not be recognized in an unincorporated territory if it would be impractical to do so.

In contrast, it is not easy, or even possible, to imagine a free government in which racial discrimination in the ownership of land is tolerated, as it is in the CNMI, where two classes of United States citizens exist – those who can own property, and those who cannot. Freedom from racial discrimination is not "peculiar to Anglo-

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[4] Indeed, as noted in the *Insular Cases,* many of the inhabitants of the new territories "had a system of jurisprudence founded upon the civil law." *Dorr, supra,* 195 U.S. at 145. "The extension of all constitutional rights, including such common law procedures as trial by jury, was considered inappropriate for people who had lived under the civil law traditions for centuries." *Water Isle Hotel v. Kon Tiki St. Thomas, Inc.,* 795 F.2d 325, 327 (3d Cir. 1986).

Saxon jurisprudence," *Downes, supra*, 182 U.S. at 283, but is accepted by every modern civilized society as a fundamental right. There is, or should be, no occasion to ask whether recognition of the right is "impractical and anomalous" as the Court of Appeals did in the present case. Neither the *Insular Cases* nor any of the later decisions of this Court sanction such an inquiry. Rather, they demonstrate that when fundamental substantive constitutional protections such as due process and equal protection are involved, recognition of those protections is not subject to considerations of expediency or local convenience.

The Court of Appeals' endorsement of the "impractical and anomalous" standard in the context of equal protection sets a dangerous precedent. It permits a territorial government, and that of the United States, to legitimize the abrogation of a constitutional right simply by stating that it is politically necessary or important. That is, in fact, precisely what occurred in the present case. The CNMI and the United States provided in the Covenant that the land alienation restrictions were "fundamental" to the Covenant and therefore could not be modified without the consent of both parties. Covenant § 105. The Court of Appeals then cited this fact in support of its conclusion that it would be "impractical and anomalous" to require the CNMI to comply with the Equal Protection Clause, reasoning that it might disrupt the political union between the CNMI and the United States. 958 U.S. at 1461-62; Pet. App. 25-26. The same sort of circular analysis could be used to justify the abrogation of virtually any constitutional right.

If, in fact, the recognition of racial equality in the ownership of land in the CNMI would be as devastating to the indigenous culture as the Court of Appeals suggested,[5] there is no reason not to require the CNMI to demonstrate that fact by establishing the existence of a compelling state interest under an equal protection analysis. Application of that standard would also have the salutary effect of requiring the CNMI to employ the least restrictive means necessary to further its legitimate interest, a requirement the Court of Appeals held was inapplicable under the "impractical and anomalous" test. 958 F.2d at 1462; Pet. App. 26.

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[5] The opinion of the Court of Appeals leaves the impression that the CNMI remains a primitive territory populated by cloistered, unsophisticated indigenous people. In fact, dramatic economic development has occurred in the CNMI since the Covenant was executed. From 1978 to 1988, the CNMI's gross economic product increased ten-fold, from about $45 million to about $445 million. Commonwealth Development Commission, *CNMI Overall Economic Development Strategy* 6 (1989). Due to the CNMI's proximity to Japan and the Philippines, tourism has flourished. From 1980 to 1990, the number of available hotel rooms tripled, from 740 to 2,651. CNMI Office of Planning & Budget, *Economic Development Strategy* 48 (1990); *Marianas Visitor Bureau Annual Report* 7 (1990).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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